MARY F. WALDRON

IBLA 97-296 Decided June 4, 1998

Appeal from a Decision of the Great Divide Resource Area, Bureau of Land Management, declaring land use permit WYW-129824 expired; terminating in part right-of-way WYW-12507; and directing removal of fencing.

Affirmed in part; vacated in part.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Generally-- Rights-of-Way: Act of October 21, 1976 (FLPMA)--Rights-of-Way: Cancellation

   A Decision terminating in part a right-of-way issued under Title V of FLPMA is properly vacated when no noncompliance with the terms of the agreement or governing statutes and regulations is apparent from the record.

APPEARANCES: Mary F. Waldron, pro se.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Mary F. Waldron has appealed from the March 6, 1997, Decision of the Great Divide Resource Area Manager, Bureau of Land Management (BLM or Bureau). That Decision declared land use permit WYW-129824 expired, partially terminated right-of-way WYW-122507, and directed Waldron to remove fencing associated with the terminated part of the right-of-way on or before July 1, 1997.

On July 5, 1991, Waldron filed an Application for Transportation and Utility Systems and Facilities on Federal Lands, serialized by BLM as WYW-122507. By this application, she requested leave to use two existing gravel roads for personal needs to access her private property. The roads are situated in Lot 4, sec. 2, T. 12 N., R. 91 W., Sixth Principal Meridian, Carbon County, Wyoming, in what BLM describes as the "south end of Airheart Pasture." One road runs roughly east-west (in what would be the NW¼NW¼ if the section was regular) following the northern bank of the First Mesa Ditch before crossing the ditch going south into Waldron's private

lands in the S½NW¼ sec. 2. 1/ The other runs north-south, following the western boundary of sec. 2 between a county road to the north and Waldron's private lands to the south. Following payment of processing and monitoring fees, BLM issued the right-of-way grant to her without any provision for a fence. 2/

In August 1991, Waldron visited BLM. A contemporary BLM conversation record notes that "it [had] been decided to include a fenceline along the right-of-way." On August 20, 1991, BLM issued a Decision for categorical exclusion for a right-of-way for the existing roads and a fence, and right-of-way W-122507 was resubmitted on August 27, 1991, including authorization for a fence. The right-of-way grant states that it was issued under Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1994). The grant states that the instrument shall terminate as of September 9, 2021, unless it is relinquished, abandoned, terminated, or modified pursuant to the terms and conditions of that instrument or of any applicable Federal law or regulation. The position of the roads and fence are indicated on a map attached to the right-of-way grant form.

Waldron apparently built the fence along the north side of the east-west road in November 1991, thus preventing cattle from reaching the road and leaving no water gap for access to the ditch. Jack Weber, her neighbor to the northwest, who owned grazing rights and grazed cattle in the Airheart Pasture, the area north of her property, apparently "opened up" the fence in order to allow his livestock to water in the ditch.

The parcel between the northern boundary of Waldron's land and the First Mesa Ditch is at the heart of this dispute. The parcel was described as being irrigated hayland, and is described by BLM as the "historically irrigated public land * * * below (south of) ditch," or the "agricultural area." We shall refer to this parcel as the "agricultural area." It appears that this area was planted by a previous owner of Waldron's land in domestic grasses and irrigated.

In early April 1992, Waldron and others contacted BLM to report the "drifting" of Weber's cattle. Waldron evidently advised BLM that she felt that the agricultural area should not be categorized in the upland rangelands and exposed to grazing.

1/ The location of First Mesa Ditch is central to this dispute. It runs through Federally-owned lands, roughly northwest to southeast across the S½NW¼ of sec. 2.

2/ Although the application and grant both refer to a single "road," the site plots attached to the right-of-way grant form clearly depict two access roads.

On April 9, 1992, Weber signed a Range Line Agreement agreeing to accept as the range boundary the road and fence line north of the First Mesa Ditch up to the point where the east-west road crosses the ditch, and then along the south side of the ditch until it intersects with the boundary between Federally-owned and Waldron's land. In return, Weber was authorized to use the existing north-south road along the west boundary of sec. 2 and was provided a 200-foot water gap to the ditch, to the east of where the east-west road crossed the ditch. The effect of this agreement was to give Waldron control of the agricultural area, as it was fenced on all sides, except the border with her private lands. 3/

In 1993, Waldron formally secured the right to use the agricultural area for 3 years. The case file concerning land use permit WYW-129824 has not been forwarded by BLM, but Waldron has forwarded a copy of the permit, along with supporting Decision, issued on August 12, 1993. The permit authorized Waldron to use the agricultural area that was created from spreader ditches extending from the First Mesa Irrigation Ditch. The Decision advised that the grant was for 3 years, ending on August 11, 1996, and that the grant would not be subject to a "right of renewal."

With the expiration of the use permit in sight, on November 6, 1995, BLM proposed that Waldron enter into a "contributing funds agreement" to purchase the agricultural area. The Bureau estimated the administrative cost of conveying the property, which Waldron had to pay under the agreement, at over $6,500. Including the cost of the parcel as then appraised, the total due was $7,099.22. Waldron rejected this offer, complaining that BLM should not pass on costs for services provided to the public which should be covered by taxes. On December 26, 1995, Waldron expressed her displeasure at BLM's proposal, but did not formally appeal it.

The Bureau's case record indicates that, despite several attempts to contact her, its personnel were unable to follow up on her concerns. In January 1997, BLM revisited the situation. A field inspection was conducted on January 8, 1997, and it revealed that a building in the eastern portion of Waldron's private lands, to which the east-west access road ran and which Waldron had once cited as a potential family dwelling, was gone. The Bureau noted that the east-west road could remain in place and, along with the north-south road, could provide ingress-egress to the parcel. However, BLM noted that the east-west fenceline should be at the border between public and private lands. The Bureau noted that this would allow the agricultural area to be used by livestock and wildlife. Apparently coincidentally, on January 24, 1997, Waldron contacted BLM to reopen the question of whether and how she could purchase the agricultural area.

On March 6, 1997, BLM issued its decision noting the expiration of land use permit WYW-129824 and partially terminating right-of-way WYW-122507. The Bureau stated as follows as to the latter:

3/ The record indicates that Waldron actively defended this parcel (and her private land) from incursions by Weber.

> An inspection of the access road rights-of-way WYW-122507 across the * * * public lands was conducted on January 8, 1997. The east/west "two-track" road and fencing extending due east from the main ¼ mile north/south road is no longer necessary to access private property residences. The log building that was situated on private lands has been removed. Access will continue, as in the past, through a small gate in the fence located on north/south route fence. Therefore, right-of-way WYW-122507 is hereby partially terminated. The terminated part of the right-of-way consists of the east-west extending "two-track" access road and associated fencing * * *. There will be no reclamation of the existing two-track road, and it may be used on a casual basis in the condition that it currently exists.
>
> The fencing associated with the east/west road is to be removed on or before July 1, 1997. Should the fence not be removed prior to July 1, 1997 it will [be] posted for 30 days and will be removed on July 31, 1997 by the BLM and all materials will become the property of the U.S. Government.

(Emphasis supplied.) Waldron filed a timely notice of appeal and statement of reasons (SOR).

Waldron does not dispute BLM's findings that the cabin no longer exists, but argues on appeal that she nevertheless needs the east-west road because there is a "deep draw separating * * * two small parcels" of her private lands. However, she also concedes that it is not her interest in maintaining access to the parcel via the east-west road, but maintaining the existing fenceline, that motivates her appeal.

[1] The only grounds for termination of a right-of-way validly issued under Title V of FLPMA are set out at 43 C.F.R. § 2803.4(c), which provides:

> The authorized officer may suspend or terminate a right-of-way grant or temporary use permit if he determines that the holder has failed to comply with applicable laws or regulations, or any terms, conditions or stipulations of the right-of-way grant or temporary use permit or has abandoned the right-of-way.

The Bureau has utterly failed, either in its Decision or in its case record, to point to any failure by Waldron to comply with applicable laws or regulations or any term, condition, or stipulation of the right-of-way grant. To the extent that the right-of-way grant shows the authorized placement of the fence, and to the extent that the current placement of the fence can be determined from the pictures and descriptions in the case record, it appears that Waldron is in compliance with the terms of the grant.

The only possible grounds for termination apparent from the record would be that, owing to the demise of the building in the eastern half of

Waldron's private lands, she could have stopped using the east-west road and, thus, abandoned the right-of-way. However, Waldron successfully rebuts this possibility in her SOR, in which she notes that the east-west road is still used to facilitate hauling hay, etc., in order to bypass a "deep draw" on her property. The Bureau openly acknowledges in its Decision that Waldron may still use the east-west road.

In any event, a decision to terminate a right-of-way granted pursuant to Title V of FLPMA will be set aside where, contrary to the provisions of 43 U.S.C. § 1766 (1994) as implemented by 43 C.F.R. § 2803.4(d), a reasonable opportunity to cure any noncompliance with the terms of the right- of-way grant was not allowed the right-of-way holder. Gene Quigley, Jr., 112 IBLA 144, 146 (1989). Thus, if BLM did have evidence showing that Waldron is not in compliance, it must present her with it and allow her a reasonable opportunity to cure prior to terminating her grant.

As noted above, it is evident that BLM's Decision is motivated by a desire to return the agricultural area to public use, and that Waldron's appeal is equally motivated by a desire to keep that area from being opened to grazing use. The fact that Waldron has effectively been allowed to fence in the agricultural area does not authorize her to engage in any use of that area. Her previous rights to use the land have expired, and, to the extent that it so declares, BLM's Decision is affirmed. Although her right to maintain the fence along the east-west road as described in the grant may not be disturbed during the term of the right-of-way in the absence of noncompliance or abandonment, BLM may assess trespass damages for any unauthorized use of that area. Further, if access to that area is possible via the water break (for example) or through any existing gates, BLM may authorize it to any party.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is vacated.

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David L. Hughes
Administrative Judge

I concur:

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Gail M. Frazier
Administrative Judge